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1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION

8

9 Debtor.

10 - - - - - x

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13 United States Bankruptcy Court

14 300 Quarropas Street, Room 248

15 White Plains, NY 10601

16

17 June 17, 2020

18 10:15 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: UNKNOWN

1 HEARING re Notice of Agenda of Matters Scheduled for  
2 Telephonic Hearing on June 17, 2020 at 10:00 a.m.

3

4 HEARING re Notice of Hearing on Interim Applications for  
5 Allowance of Compensation and Reimbursement of Expenses on  
6 June 17, 2020 at 10:00 a.m. (related document(s) 7820, 7847,  
7 7815, 7818, 7841, 7816, 7846, 7814)

8

9 HEARING re Fourth Interim Fee Application of Prime Clerk  
10 LLC, as Administrative Agent to the Debtors, for Services  
11 Rendered and Reimbursement of Expenses for the Period from  
12 November 1, 2019 through February 29, 2020 (ECF 7814)

13

14 HEARING re Fourth Interim Application of FTI Consulting,  
15 Inc., Financial Advisor to the Official Committee of  
16 Unsecured Creditors of Sears Holdings Corporation, et al.  
17 for Interim Allowance of Compensation and Reimbursement of  
18 Expenses for the Period: 11/1/2019 to 2/29/2020,  
19 fee:\$337,852.50, expenses: \$1,379.56 (ECF #7815)

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1 HEARING re Fourth Interim Fee Application of Akin Gump  
2 Strauss Hauer & Feld LLP as Counsel to the Official  
3 Committee of Unsecured Creditors for Allowance of  
4 Compensation for Services Rendered and Reimbursement of  
5 Expenses for the Period: 11/1/2019 to 2/29/2020,  
6 fee: \$4,217,1 12.50, expenses: \$1,424,635.72 (ECF #7816)

7

8 HEARING re Fourth Application of Weil, Gotshal & Manges LLP,  
9 as Attorneys for the Debtors, for Interim Allowance of  
10 Compensation for Professional Services Rendered and  
11 Reimbursement of Actual and Necessary Expenses Incurred  
12 from: 11/1/2019 to 2/29/2020, fee: \$5,051,526.75, expenses:  
13 \$206,901.80 (ECF #7818)

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15 HEARING re Fourth Application for Interim Professional  
16 Compensation for Paul, Weiss, Rifkind, Wharton & Garrison  
17 LLP, Debtor's Attorney, period: 11/1/2019 to 2/29/2020, fee:  
18 \$75,781.00, expenses: \$207,704.60 (ECF #7820)

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1 HEARING re Third Application for Interim Professional  
2 Compensation Third Joint Application of Paul E. Hamer, as  
3 Fee Examiner and Ballard Spahr LLP, as Counsel to the Fee  
4 Examiner for Interim Allowance of Compensation for  
5 Professional Services Rendered and Reimbursement of Actual  
6 and Necessary Expenses Incurred period: 11/1/2019 to  
7 2/29/2020, fee: \$562,951.00, expenses: \$2,520.24 (ECF  
8 #7862) Reset for 07/15/2020 at 10:00 am  
9

10 HEARING re First Interim Fee Application of Herrick,  
11 Feinstein LLP as Special Conflicts Counsel to the Official  
12 Committee of Unsecured Creditors for Allowance of  
13 Compensation for Services Rendered and Reimbursement of  
14 Expenses for the period: 1/2/2019 to 2/29/2020,  
15 fee: \$1,076,531.5, expenses: \$14,827.17 (ECF #7958)  
16

17 HEARING re Status Regarding Effective Date  
18

19 HEARING re Motion to Allow for an Order Pursuant to 11  
20 U.S.C. § 108(C) Nunc Pro Tunc to the Petition Date filed by  
21 Sonia E Colon on behalf of Santa Rosa Mall, LLC (ECF #7910)  
22  
23  
24  
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1 HEARING re Debtors' Limited Objection to Motion for an Order  
2 Pursuant to 11 U.S.C. § 108(c) Nunc Pro Tune to the Petition  
3 Date (related document(s) 7910) filed by Jacqueline Marcus on  
4 behalf of Sears Holdings Corporation (ECF #8021)

5

6 HEARING re Reply to Debtors' Limited Objection to Motion for  
7 an Order Pursuant to 11 U.S.C. 108(c) Nunc Pro Tunc to the  
8 Petition Date (related document(s) 7910) filed by Gustavo A  
9 Chico-Barris on behalf of Santa Rosa Mall, LLC. (ECF #8026)

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

3 WEIL, GOTSHAL & MANGES

4 Attorney for Debtors

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6 New York, NY 10153

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8 BY: GARRETT FAIL

9 JACQUELINE MARCUS

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16 BY: DAVID WANDER

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18 FERRAIUOLI LLC

19 Attorney for Santa Rosa Mall

20 221 Ponce de Leon Avenue

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23 BY: GUSTAVO CHICO-BARRIS

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25

1       **BALLARD SPAHR**  
2               **Fee Examiner**  
3               **1675 Broadway**  
4               **New York, NY 10019**

5  
6       **BY: PAUL E. HARNER**  
7               **VINCENT MARRIOTT**

8  
9       **ALSO APPEARING TELEPHONICALLY:**

10      **SHIRIN MAHKAMOVA**  
11      **BRYAN PODZIUS**  
12      **NATAN BANE**  
13      **ALEXANDER TIKTIN**  
14      **ARLENE ALVES**  
15      **BRYAN CIMALA**  
16      **ALIX BROZMAN**  
17      **PATRICIA WALSH**  
18      **VADIM NIKITINE**  
19      **EMILY PAGORSKI**  
20      **LEE J ROHN**  
21      **CHRIS KIM**  
22      **ANDREW CARRILLO**  
23      **JEREMY RYAN**

24  
25

## 1 | PROCEEDINGS

2 THE COURT: All right. The next case and last  
3 case on the agenda is in re. Sears Holdings Corp. et al.

4 And again, I --

5 MR. FAIL: Thank you, Your Honor.

6 THE COURT: Right. And again, I have an agenda  
7 for this set of hearings as well, an omnibus agenda.

8 MR. FAIL: Good morning, Your Honor. Garrett  
9 Fail, Weil Gotshal & Manges, for the Debtors. We did file  
10 an agenda for this morning's hearing. The first item on the  
11 agenda is for seven fee applications, all of which are  
12 uncontested. Those include applications for Prime Clerk,  
13 FTI, Akin Gump, Weil Gotshal, Paul Weiss, Paul Harner as the  
14 fee examiner, Herrick Feinstein. And each of those was  
15 noticed and there was no objection for any of them, so  
16 they're all going forward on an uncontested basis this  
17 morning.

18 THE COURT: Okay. Do these applications reflect  
19 any pre-application reductions worked out with the fee  
20 examiner?

21 MR. FAIL: Your Honor, I think in the order that  
22 we propose to submit granting the applications, I believe  
23 there's a reservation of rights. To the extent any of the  
24 professionals have reached an agreement, we have verified  
25 with the professionals that the numbers in the order that we

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1 submitted to chambers are correct from their perspective. I  
2 don't know if Mr. Harner is on the phone or his  
3 representative and wants to speak to specific applications.  
4 But in general, there's been a reservation of rights to  
5 continue to the final fee applications to preserve any  
6 ability, but not to delay for process. But if Mr. Harner --

7 MR. HARNER: Your Honor, it's Paul Harner. That's  
8 correct.

9 THE COURT: Well, I guess on that point, it's  
10 clear that these Debtors are cash strapped. And I just --  
11 I'm not quite sure whether the reservation is going to be  
12 effective, if you follow me.

13 MR. HARNER: Well, the Debtors, you know, cash  
14 position is what it is, Your Honor.

15 THE COURT: Right.

16 MR. HARNER: But I don't know that that affects  
17 the solvency of the professionals that are involved in being  
18 paid.

19 THE COURT: Well, is each professional -- I mean,  
20 for, you know, the biggest downside for a professional would  
21 be that the fee examiner determines at the end of the day  
22 that he's going to object to X-hundred thousand of fees.  
23 Mr. Harner, you're satisfied that either that can come out  
24 of the last amount that would be still not paid or that the  
25 firms are good for it if they have to disgorge it?

1                   MR. HARNER: Yes, Your Honor, I am. We have been  
2 sensitive to that issue. And, obviously, it's been one  
3 that's in the forefront of the professionals, in my mind and  
4 the Court's mind, for some period of time. But we are  
5 satisfied that to the extent that there are either agreed  
6 upon reductions or objections that result in Court ordered  
7 reductions, that they can be satisfied either out of amounts  
8 otherwise payable in the final fee application process,  
9 otherwise held back, or by disgorgement from the  
10 professionals involved.

11                  THE COURT: Okay, all right. And the  
12 professionals understand that? I mean, to put it  
13 differently, there's a fair amount of -- I'm not sure it  
14 rises to the level of precedent, but there are remarks both  
15 on the record and sometimes in cases by bankruptcy judges  
16 saying, you know, I'm reluctant to order disgorgement.

17                  Here, I guess given the reservation of rights, I  
18 just want to put people on notice. I'm not saying that I  
19 would order --

20                  MR. HARNER: Right.

21                  THE COURT: -- you know, (crosstalk).

22                  MR. HARNER: We're reluctant to have disgorgement  
23 and, you know, believe that the applications are  
24 appropriate, and the fees and expenses are reasonable and  
25 justified. And so, even if they are challenged, we

1 obviously will stand behind the applications.

2 THE COURT: Right. But I guess I don't want,  
3 given the reservation of rights, given the fact of the  
4 Debtors' cash position, which I do think is relevant here  
5 because often when there's a reservation of rights, it can  
6 be dealt with in the final fee application by saying, well,  
7 I'm not going to authorize X amount of the final fee app for  
8 the last period, which would have been paid in cash --  
9 possibly that wouldn't happen here.

10 MR. FAIL: Just one reminder, Your Honor. This  
11 case is part of the (sound glitch) of the carveout.

12 THE COURT: Right.

13 MR. FAIL: And so, the Debtors' professionals and  
14 the committees' professionals, you know, have not agreed to  
15 take the same risks that other parties have faced in this  
16 case, so we are differently situated, and I'll just remind  
17 the Court of that as well.

18 THE COURT: Well, no, I understand the carveout  
19 point. I guess ultimately my point is this: that, again,  
20 this is no comment on the fee applications that I've  
21 reviewed, either this particular set or prior ones. But if  
22 the fee examiner finds something and convinces me that I  
23 should grant that objection, given the reservation of rights  
24 and given that we're not dealing with it now, I think people  
25 should understand that I'm not going to be reluctant about

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1       directing disgorgement. I think that's the proper approach,  
2       because otherwise it would force the examiner to make  
3       objections on an interim basis, and that's wasteful, I  
4       think.

5                    MR. FAIL: Thank you, Your Honor, understood. And  
6        maybe what I would suggest is that we hold off. If Your  
7        Honor approves the objection -- the applications today  
8        before the Debtors submit the proposed order, a final  
9        proposed order to chambers and before the Court enters it,  
10       the Debtors -- Weil Gotshal can communicate with each of the  
11       professionals whose application is on today, ensure that  
12       they have heard the message that the Court is giving today,  
13       see if there's any engagement that could be productive or  
14       any proposed changes that need to occur consensually with  
15       Mr. Harner and his team, and submit a proposed order with  
16       any changes or the same to the Court after the professionals  
17       have had an opportunity to consider Your Honor's statements  
18       today.

19                    But conditionally, the request that the Court  
20        approve it as it, subject to any additional consensual  
21        resolutions reached in the coming days. Does that approach  
22        work?

23                    THE COURT: Yeah, that's fine, that's fine. Now  
24        related to that, and this is my only set of comments on any  
25        of these applications, but it comes up in at least three

1 cases. It appears to me that, at least with respect to the  
2 Akin Gump, Weil Gotshal, and Paul Weiss applications -- and  
3 it's most dramatic in the Paul Weiss one, not in terms of  
4 the amount but just in terms of the identification of the  
5 issue -- a substantial amount of the time billed to fee and  
6 employment matters appears to be billed to responding to the  
7 fee examiner, dealing with the fee examiner, revising time  
8 entries and the like.

9 I'm not talking about redacting time entries for  
10 privilege and things like that. I'm really focusing on  
11 literally dealing with the fee examiner's inquiries about  
12 the bill and/or maybe discussing potentially problematic  
13 aspects of the bill, although I don't know if that's  
14 included in this because it's not in that much detail. No  
15 one has addressed this and there's a reservation of rights  
16 that we just spent some time on.

17 I'm not sure whether, under the Baker Botts-Asarco  
18 case, that time of time is compensable. And I think  
19 normally if a client had questions about a bill, made  
20 inquiries about time records, et cetera in a non-bankruptcy  
21 context, the law firm wouldn't bill the client for answering  
22 those questions.

23 So I'm highlighting this issue with the  
24 reservation of rights. I don't think I need to address it  
25 at this point, but I think it is an issue. And to the

1 extent that Mr. Harner hasn't focused on it -- I think he  
2 should -- the U.S. Trustee may want to focus on it and  
3 certainly the lawyers may want to focus on it. I don't have  
4 a fixed view on it. I'm not asking for briefing on it. My  
5 inclination, unless I hear anyone who, frankly, probably  
6 shouldn't be heard since there are no objections to the  
7 allowance of these interim applications, but my inclination  
8 is to grant the applications, but to have raised that issue  
9 for future consideration.

10 MR. FAIL: Thank you, Your Honor. So we'll take t  
11 he granting of the application. And if there's nothing  
12 else, we can move on to the status conference that's  
13 scheduled for agenda item number two.

14 THE COURT: That's fine. So you could email the  
15 order in with schedules A and B. I think in the past, we've  
16 had all professionals, including the committee  
17 professionals, covered in one order.

18 MR. FAIL: That's right.

19 THE COURT: And that's subject to the procedure  
20 that you outlined a few minutes ago. Hopefully, there won't  
21 be any tinkering with it, and everyone can understand the  
22 point I was making about disgorgement. So let's move on, as  
23 you said, to the next agenda item.

24 MR. FAIL: Thank you, Your Honor. Again, it's  
25 Garrett Fail from Weil Gotshal for the Debtors. The Debtors

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1 are providing the Court and parties-in-interest with this  
2 update pursuant to Paragraph 14 of the confirmation order.  
3 The Debtors have given updates before on the progress of  
4 administering the cases, including on December 13th and  
5 February 24th.

6 The Debtors filed an exhibit on the docket prior  
7 to the start of this hearing that may be helpful for  
8 participants to view; it's at ECF 8032. The Court will  
9 recall confirming the Chapter 11 plan in these cases in  
10 October. The confirmation order authorized the continuation  
11 of payments of administrative claims prior to the  
12 confirmation of the plan, and that's not necessarily  
13 unusual.

14 One key part that required Court approval was the  
15 settlement, where administrative creditors agreed, actively  
16 or passively, to accept less than 100 percent of their  
17 allotted claim amount by prioritizing payment to consenting  
18 creditors and creditors who reconciled their claims with the  
19 Debtors ahead of payment to other administrative creditors  
20 that actively refused to compromise on the amount of their  
21 claims or the amount of their recovery.

22 The Debtors have honored their end of the  
23 agreement. To date, the Debtors, working closely with the  
24 UCC and the admin claims representative, have allowed 1,606  
25 claims after reconciling more than 3,942 total claims,

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1       ballots, motions, books and records, and other requests for  
2       payment and administrative claims. In total, the Debtors  
3       eliminated more than \$1.3 billion of claims asserting  
4       entitlement to administrative or priority status. This took  
5       a significant amount of work; the numbers demonstrate that.

6               There are 167 administrative claims currently  
7       being disputed that assert approximately \$49 million. As  
8       required, the Debtors made an initial post-confirmation  
9       settlement distribution of \$21 million in September. The  
10      Debtors are ready to announce their next post-confirmation  
11      settlement distribution, which is required by the  
12      confirmation order and, as agreed, they're giving advanced  
13      notice.

14               They intend to provide notice of the allowed  
15      claims receiving distributions and the proposed amounts,  
16      subject to adjustment, in the days and weeks following this  
17      hearing. The notice will announce the distribution date,  
18      which will be subsequent to the next omnibus hearing in  
19      July.

20               The notice will list each of the 1,121 claims that  
21      the Court ordered can now be satisfied in full up to their  
22      respective settlement account. Although each of these  
23      claims was considered de minimis, the aggregate number  
24      represents a substantial, 70 percent, of all of the allowed  
25      administrative claimants in this case, and they will now be

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1 satisfied in full in compliance with the confirmation order;  
2 955 of these claims are newly allowed, and will be receiving  
3 their first and final payment.

4 The notice will also show that approximately 294  
5 additional newly allowed claims -- that's in addition to the  
6 955 de minimis ones -- will receive their first post-  
7 confirmation settlement distribution. These 294 claims will  
8 receive the full (sound glitch) distribution, that is the  
9 same 28.7 percent that was distributed to holders of allowed  
10 claims in December.

11 The notice will also show the amounts in reserve  
12 for each of the remaining disputed claims. To be clear, the  
13 Debtors will be reserving the same 28.7 percent that they  
14 are distributing to the newly allowed settlement of  
15 administrative claims. The amount of the reserve may be  
16 significant, in part because the Debtors intend to reserve  
17 amounts for claimants who are recipients of potentially  
18 avoidable transactions.

19 What the Debtors are proposing in part is (sound  
20 glitch) to settle and to get a distribution to do so now  
21 before the July hearing. The Debtors encourage parties to  
22 do so. Otherwise, creditors will wait until the next  
23 distribution, as well as the completion of any necessary  
24 litigation to receive any payments. The Debtors do not  
25 intend, in general, to make interim distributions, so there

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1 is an incentive for parties to settle now, which will free  
2 up what the Debtors believe are excess reserves for the  
3 benefit of all allowed and remaining disputed claims.

4 The estimated amount of the distribution to  
5 allowed creditors is \$15 million, and the estimated amount  
6 being held back in reserves for disputed claims is \$14  
7 million.

8 Today, the Debtors are providing the Court and all  
9 creditors with an update simultaneously. The summary  
10 conclusion is that met that Debtors' performance and go  
11 forward estimates remain consistent with the testimony  
12 presented that was the basis for the confirmation order.

13 Let me explain further. At confirmation, the  
14 Debtors' estimated total sources of \$83.5 million from cash  
15 on hand, which is \$45.4 million, net proceeds related to a  
16 Calder statue, real estate proceeds, de minimis assets,  
17 certain EDA funds with which the Court is familiar, and  
18 utility deposits.

19 Through May of 2020, the Debtors collected \$79.9  
20 million of that, again, from cash on hand, real estate  
21 proceeds, de minimis assets, the EDA funds, and utility  
22 deposits. The Debtors estimate future collections from the  
23 Calder statue, real estate proceeds, and de minimis assets  
24 will be an additional \$13.1 million in aggregate. So in  
25 total for those categories of sources, the total estimate

1 has increased by \$9.5 million.

2 Following confirmation, the Debtors also received  
3 the following additional cash amounts that were not included  
4 in the Debtors confirmation estimates: \$9 million from the  
5 professional fee carveout at confirmation; \$4.9 million of  
6 tax refunds; \$3.9 million from Blue Cross/Blue Shield  
7 escrow; and \$2 million of other. So the running total  
8 increase to sources from confirmation date estimates,  
9 therefore, is now \$29.3 million, for those keeping track.

10 The Debtors further estimate that they have \$7.5  
11 million of tax refunds outstanding and \$.7 million of  
12 additional amounts they will get from a Blue Cross/Blue  
13 Shield escrow. That brings the running increase in sources  
14 from confirmation date estimates to \$37.5 million.

15 The Court will recall at the confirmation hearing  
16 that the Debtors and Transform were disputing whether  
17 Transform was obligated to satisfy or reimburse the Debtors  
18 for \$90 million of 503(b) (9) claims. Ultimately, the Court  
19 approved, without any objection from any party, a settlement  
20 between the Debtors and Transform whereby the Debtors  
21 received \$12 million to satisfy 503(b) (9) obligations.

22 While some may suggest this is a decrease from  
23 estimates used by the Court to determine feasibility of the  
24 plan at confirmation, the record reflects the opposite; that  
25 is, \$12 million more than was estimated as a money good

1 source. For example, the Court may recall the testimony of  
2 Mr. Murphy at confirmation. He noted that the Debtors'  
3 claims against Transform was subject to offsets that  
4 included a dispute over inventory and receivables, and that  
5 Transform may have a substantial claim for reduction that  
6 may be \$60 million, so that only 37 would be Transform's  
7 obligation. Mr. Griffith also testified that the Debtors  
8 assumed now that no further dollars would come in on APA  
9 Transform litigation. Both of those -- that testimony was  
10 on the October 3rd hearing.

11 So to summarize the sources, the total sources  
12 collected through May 2020 is \$111.7 million, and the  
13 Debtors' estimate for sources remaining to be realized is  
14 \$21.3 million, excluding certain litigation assets. That  
15 combined total with excluding litigation assets is \$133  
16 million, compared to the \$83.5 million number presented at  
17 confirmation, excluding the disputed 503(b)(9) claims  
18 against Transform; that's an increase of approximately \$50  
19 million, it's \$49.5 million.

20 I'll come back to the litigation assets again, but  
21 first let me discuss the uses. At confirmation, the  
22 Debtors' testimony produced a range of estimates for total  
23 uses: a low estimate of \$210 million and a high estimate of  
24 \$278 million. Today, the Debtors' estimate of uses remains  
25 within that range at \$245.3 million; that's \$32.7 million

1 below the estimated high end range.

2                   Administrative, secured and priority claims  
3 estimates were \$176 million on the low end and \$244 million  
4 on the high end. The Debtors estimate that as a result of  
5 the administrative claims settlement and the work that  
6 they've done to reconcile claims, the cost of  
7 administrative, secured and priority claims will be \$173  
8 million; in other words, below the low end of confirmation  
9 estimates. This includes a conservative estimate for the  
10 full amount asserted by the qui tam plaintiff from whom  
11 we've heard recently and whose claim is subject to dispute  
12 and a complete reservation of rights. And as required by  
13 the confirmation order, the \$25 million of funding for the  
14 liquidating trust remains intact.

15                   In total, the uses is estimated to be \$245.3  
16 million, which is within the range of confirmation  
17 estimates; \$32.7 million lower than the high end range of  
18 confirmation estimates.

19                   Reduction of costs of claims was offset by an  
20 increase in other post-confirmation expenses, among other  
21 things: responding to litigation over confirmation appeals  
22 and adversary proceedings, post-closing matters, automatic  
23 stay issues, real estate transactions, and claims with  
24 reconciliation and disputes required significant resources.

25                   The result, though, is the progress that we've

1       been able to today: net then, the Debtors are outperforming  
2       confirmation estimates with respect to non-litigation  
3       sources and total uses. Of course, the total sources I just  
4       summarized are lower than the total uses, \$112.3 million  
5       lower, but that was the case at confirmation; that is not a  
6       change in circumstances.

7               In the low claims estimates of uses, without any  
8       estimate for contribution by Transform for the 503(b)(9)  
9       disputes, the shortfall was \$126.5 million. In the high  
10       claims estimate of uses, again, without any estimate for  
11       contribution by Transform for the 503(b)(9) disputes, the  
12       shortfall was \$194.5 million. The gap has actually narrowed  
13       over time since confirmation.

14               Even when the Court considered the potential  
15       impact for a complete win for the Debtors against Transform  
16       on the 503(b)(9) dispute and the Court calculated the  
17       shortfall to be \$90 million less, between \$35 million and  
18       \$100 million. The Court considered the shortfall would  
19       probably be greater than the Debtors estimated, \$10 million  
20       greater, bringing the shortfall estimated at confirmation to  
21       approximately \$110 million, almost exactly where we find  
22       ourselves today.

23               The Debtors' testimony for confirmation is that  
24       the Debtors may require proceeds of, among other things, the  
25       ESL litigation, to fund payments under the plan. Mr.

1 Griffith's Declaration included that testimony. Mr.  
2 Griffith testified that between the ESL litigation and  
3 preference actions, the Debtors probably need a little over  
4 \$100 to \$120 million; that was the testimony on October 3rd.  
5 And the Court acknowledged that the plan support parties  
6 were relying on preference recoveries and the ESL and D&O  
7 litigation for a distribution under the consent program.

8                   Turning now to the litigation assets of the  
9 Debtors, which were considered at confirmation, given the  
10 shortfall I described. At confirmation, the Debtors  
11 estimated that the combined potential recovery from ESL-  
12 related litigation and avoidance actions was \$268 million;  
13 that number was greater than the then-projected shortfall  
14 and, accordingly, the plan was confirmed.

15                   To date, the Debtors have not been presented with  
16 any reason to alter their absence of the ESL-related  
17 litigation. The litigation is being prosecuted by the  
18 liquidating trust; and, in fact, the Court is aware that  
19 counsel to the creditors' committee. At confirmation,  
20 though, the Debtors' testimony acknowledged it is, of  
21 course, possible that no funds are received as a result of  
22 the ESL litigation, and the Court observed, you know, that  
23 they were real claims and not visionary schemes.

24                   Your Honor is aware the adversary proceeding is  
25 currently moving through the motion (sound glitch) phase

1 with argument and the petition set for the end of August.

2 In the meantime, we understand the Court recently assisted  
3 the parties with a case schedule governing document  
4 production and the commencement of (sound glitch).

5 Counsel to the creditors' committee and the  
6 committee designated on the pre-effective date committee  
7 have participated in discussions regarding the upcoming  
8 second settlement distribution to administrative creditors  
9 and are supportive of the Debtors moving forward with that  
10 distribution.

11 Turning to the avoidance actions. At  
12 confirmation, the Debtors estimated that gross recoveries  
13 would be approximately \$100 million. To date, recoveries,  
14 including by setoff or settlement of administrative claims,  
15 has been \$17.8 million. The Debtors estimate that the  
16 remaining recoveries will be approximately \$59.7 million but  
17 will take time to recover.

18 In total, the Debtors estimate of recoveries on  
19 avoidance actions has decreased to \$77.5 million, but the  
20 estimate is still within the range of the estimate provided  
21 in the Debtors' testimony at confirmation trial of what  
22 would be received and recovered prior to the effective date.

23 Mr. Griffith testified that his estimated guess to  
24 the nearest \$10 million of preference recovery by the end of  
25 2019 would be \$15 to \$20 million, and anticipated recoveries

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1 in 2020 would be another \$60 million or so, for a total of  
2 \$80 million. Net, the Debtors estimate of gross litigation  
3 recoveries has decreased to \$245.5 million, but that is  
4 still more than two times the projected shortfall between  
5 the total sources and total uses.

6 The Debtors are optimistic that they'll be able to  
7 make the next required distribution pursuant to the  
8 confirmation order without any additional administrative  
9 expense of litigating to do so. While there may have been  
10 speculation without the information provided today, the  
11 Debtors provide this public report in accordance with the  
12 confirmation order to advise that in the Debtors' view, net  
13 circumstances have not changed materially since  
14 confirmation. The Debtors stand ready to work with the  
15 remaining disputed creditors to resolve their claims in time  
16 for the upcoming distribution.

17 That concludes the Debtors' update this morning,  
18 Your Honor.

19 THE COURT: Okay, thank you. So, Mr. Fail, let me  
20 make sure I understand. I've been listening, so I haven't  
21 gone on ECF. Is the report that you just gave orally also  
22 now in writing on ECF on the docket?

23 MR. FAIL: In summary format, pdf of the chart --  
24 a pdf chart containing the numbers that I went through are  
25 provided. I added additional color, and that's noted in the

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1 presentation as well, but the -- the presentation  
2 accompanies it. The numbers, the comparisons have all been  
3 provided, Your Honor.

4 THE COURT: All right. And then you also  
5 addressed the fact that notice will be going out shortly  
6 with respect to the next distribution on administrative  
7 expenses, and that I believe you said the actual  
8 distribution is slated to be made after the July omnibus  
9 hearing.

10 MR. FAIL: Correct, Your Honor.

11 THE COURT: Okay. And you urged the parties who  
12 remained in disputes with the Debtor over the allowance of  
13 their administrative or priority or secured claim to  
14 consider engaging at this point in settlement discussions so  
15 that they could participate in that distribution.

16 I'm trying to think practically here. When,  
17 recognizing that you're going to be giving that notice which  
18 describes the anticipated distribution, when would sort of  
19 the last time -- I'm not setting a date, I'm not setting a  
20 bar date or anything like that, but when would be the last  
21 time as a practical matter that you think you could agree on  
22 a settlement, if you wanted to, in order to participate in  
23 the next distribution?

24 MR. FAIL: Current thinking is prior to the July  
25 omnibus hearing, Your Honor.

1                   THE COURT: When you say prior to, you mean right  
2 prior to, like the day before, something like that?

3                   MR. FAIL: Your Honor, we'll provide, you know, to  
4 the extent that we need further clarity from our end  
5 mechanically, we will provide that in the notice so that  
6 there's no ambiguity. But the intent of the notice is to  
7 provide each creditor with the status of its claim. And the  
8 notice will say it is subject to adjustments and  
9 reconciliations to the extent that there was an error, the  
10 numbers may change to the extent that distributions are  
11 freed -- that reserves are freed up and they're in excess,  
12 the amount of the distributions, you know, may change  
13 accordingly.

14                   So we view this as if it's like a schedule, and so  
15 there's exercise and to the extent that there have to be  
16 adjustments, there have to be adjustments, and if there's  
17 disputes --

18                   THE COURT: No, I understand that, and what I was  
19 raising is not required by the settlement procedures in the  
20 confirmation order. But I think it might be useful to  
21 include in the notice that the Debtors recommend that if you  
22 have a disputed claim that would be subject, if allowed, to  
23 this distribution, you seek to either settle it or have it  
24 resolved before the distribution.

25                   MR. FAIL: That is our intent, Your Honor. Thank

1 you, yes.

2 THE COURT: Okay. And that there's some date  
3 that's tied to that July hearing, I think that's important  
4 to -- not as a firm date, but just as a practical matter --  
5 to alert people to it.

6 MR. FAIL: Understood, Your Honor, and agree.

7 THE COURT: Okay, so I appreciate the update.

8 Does anyone have anything further to say on it?

9 MR. WANDER: Good morning, Judge. This is David  
10 Wander of Davidoff Hutcher & Citron. May I be heard for a  
11 brief moment?

12 THE COURT: Yes, sure.

13 MR. WANDER: I represent on this call two of the  
14 creditors, Orient Craft and HK Sino-Thai Trading. I first  
15 want to thank Mr. Fail and Weil Gotshal for the document  
16 that they just filed. I was reading along, Your Honor, as  
17 Mr. Fail made his presentation, and it provides a tremendous  
18 amount of information and I want to thank them for that.

19 I just want to say for the record that my overall  
20 view of the results to date and what was said at  
21 confirmation are different than what Mr. Fail presented to  
22 Your Honor, but there's no need for me to go into that any  
23 further. And I will digest this further, ask follow-up  
24 questions of Mr. Fail and the others, and respond in advance  
25 of the July hearing.

1           I had requested, Your Honor, that the Court at  
2 least schedule a final date for the World Imports argument.  
3 And in my latest submission, I suggested that it be in  
4 October, which would be the one-year anniversary of the  
5 confirmation hearing. Some of my colleagues might believe  
6 it should be heard sooner at the July hearing, but I simply  
7 ask, Your Honor, that we set some kind of finality so that  
8 the creditors, including my clients, who may have funds in  
9 reserve for their claims. If we get a favorable decision,  
10 then the funds can be distributed and we won't be held, what  
11 I'll call, hostage to funds just remaining in reserve  
12 indefinitely.

13           So I ask, Your Honor, that we bring at least  
14 closure to the adjournments on the World Imports issue and  
15 schedule that matter for oral argument in the near future.

16           MR. FAIL: Your Honor, Garrett Fail, Weil Gotshal  
17 again. Before I (sound glitch) on this, I've set it for the  
18 August hearing, and that hearing's been -- the August  
19 omnibus has been moved to September, so there should be  
20 nothing left to address on that. And as we made clear  
21 before, given the extent that there's a ruling adverse to  
22 the Debtors on that, given the appellate process playing  
23 out, (sound glitch) will not be made on those claims at this  
24 (sound glitch) distribution in any regard.

25           THE COURT: Right. Well, it seems to me that the

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1 decision on when to hear those issues, if ever, depends on a  
2 number of factors that cannot be truly predicted in advance,  
3 including who simply said I'm not discussing this anymore on  
4 a potentially consensual basis.

5 How the Debtors are spending their time in dealing  
6 with claims generally? Based on the work to date and the  
7 fact that, at this point of over 3,000 requests for payment  
8 of administrative expenses, priority amounts or cash that  
9 would otherwise need to come out, only 167 remain. It  
10 appears to me the Debtors have been moving diligently and  
11 properly prioritizing the work.

12 There may be a point when we're together in  
13 September that it appears to me this is the right time to  
14 hear the matter, i.e., in October. But again, as long as  
15 there's a reserve for it and the Debtors are spending their  
16 time dealing with a great many more claims than would be  
17 covered by this particular legal issue, it makes sense to  
18 have them continue to deal with the larger number.

19 As Mr. Fail pointed out, there is a cost -- which  
20 is understandable of course because these are legal issues  
21 and, therefore, lawyers are spending time on them and  
22 billing time on them -- there's a cost to liquidating the  
23 administrative expense claims, priority claims and other  
24 requests for hundred-cent payment, and it's important to use  
25 those dollars efficiently.

1                   So I'm reluctant on June 17th to set a hearing  
2                   date on an issue that I think at this point is not the main  
3                   issue to focus on in terms of enabling the distributions  
4                   under the plan. But it does appear to me that we're getting  
5                   down to the point if people don't want to negotiate and  
6                   there aren't other matters involving the claims process that  
7                   should take my word even, may well be that October is the  
8                   right date.

9                   So does anyone else have anything to say on the  
10                  report? Okay, very well.

11                  MR. FAIL: Thank you, Your Honor. The next item  
12                  on the agenda is a motion pursuant to Section --

13                  MR. HARNER: Your Honor, I'm sorry to interrupt  
14                  Mr. Fail. It's Paul Harner. May Mr. Marriott and I now be  
15                  excused?

16                  THE COURT: Yes, certainly.

17                  MR. HARNER: Thank you.

18                  MR. MARRIOTT: Thank you, Your Honor.

19                  THE COURT: Okay, you can go ahead, Mr. Fail.

20                  MR. FAIL: Thank you, Your Honor. The next item  
21                  on the agenda is agenda item number 9, the motion pursuant  
22                  to Section 108 of the Bankruptcy Code. It's a motion that's  
23                  not filed by the Debtors and will be handled for the Debtors  
24                  by my colleague, Ms. Marcus.

25                  THE COURT: Okay.

1 MR. FAIL: Thank you, Your Honor.

2 THE COURT: Okay. So this is a motion by Santa  
3 Rosa Mall, LLC that, at least as set forth in Paragraph 11  
4 of the motion, seeks, quote, "An order tolling any  
5 applicable non-bankruptcy statutes of limitations nunc pro  
6 tunc to the petition date pursuant to Sections 108(c) and  
7 105 of the Bankruptcy Code and applicable case law."

8 I've reviewed the motion, the Debtors' response  
9 and Santa Rosa Mall's reply. The reply spends a significant  
10 amount of time referring to the doctrine of equitable  
11 tolling under various state law regimes. So I guess my  
12 first question for the movant's counsel is, in seeking this  
13 relief, which again is a tolling nunc pro tunc to the  
14 petition date pursuant to Sections 108(c) and 105 of the  
15 Bankruptcy Code and applicable state law, does that include  
16 the doctrine of equitable tolling?

17 MR. CHICO: Good morning, Your Honor. On behalf  
18 of Santa Rosa Mall, I am Gustavo Chico. Can you hear me  
19 okay?

20 THE COURT: Yes. I can hear you fine, sir.

21 MR. CHICO: Your Honor, we cited the equitable  
22 tolling to illustrate it is applicable under Puerto Rico  
23 law. Puerto Rico law allows for the tolling of these  
24 provisions. Under state law basically, these causes of  
25 actions may be tolled.

1                   THE COURT: Okay. So the answer to my question  
2 was yes?

3                   MR. CHICO: Yes, they may be tolled.

4                   THE COURT: All right. And you're seeking relief  
5 on that basis also.

6                   MR. CHICO: Well, if I may, Your Honor. The  
7 purpose of the motion is during the last hearing, the Court  
8 made a determination that 362 -- the Court was not extending  
9 the automatic stay; it simply ruled that it applied. And in  
10 ruling like that, Santa Rosa is prevented from filing any  
11 complaint against the underwriters. And if you read Section  
12 108, Section 108 expressly tolls against the debtor.

13                  And since our causes of actions are against the  
14 underwriters, what we move for is a clarification that if  
15 the Court determined that the automatic stay applies, then -  
16 - to prevent us from filing any cause of action against the  
17 underwriters who are third parties, then we move the Court  
18 to clarify that because the automatic stay applies. Then  
19 under 108 and the Court's equitable power, if we're being  
20 paused to file a complaint against the underwriters, then  
21 the tolling period should be fully tolled.

22                  THE COURT: Well, but my question was, are you  
23 seeking relief just under Section 108(c) and 105 or also  
24 under the doctrine of equitable tolling as it may apply in  
25 non-bankruptcy law?

1 MR. CHICO: We're -- under all of them.

2 THE COURT: Okay, all right. So, again, I guess -  
3 - in the same paragraph that I quoted, Paragraph 11 of the  
4 motion, it says, "In light of the order denying the motion  
5 for relief from stay and to preserve its right to appeal,  
6 Santa Rosa is seeking this relief." Maybe I'm just being  
7 dense, but what -- how is this relief necessary to preserve  
8 Santa Rosa's right to appeal; first, appeal what?

9 MR. CHICO: Well, we appealed the order denying  
10 the relief from stay. We don't know how long the Court is  
11 going to take in ruling that appeal.

12 THE COURT: Right. But how is this relief related  
13 to that appeal, the relief you're requesting now?

14 MR. CHICO: Well, Your Honor, because the appeal  
15 may take some time, some statutes of limitation may be  
16 running. If we prevail on the appeal, then we can just go  
17 and file a complaint against the underwriters, but that may  
18 take some time. And during that time, then time is still  
19 running.

20 THE COURT: Okay. But you're looking for relief  
21 nunc pro tunc to the petition date, so that really doesn't  
22 have anything to do with the appeal.

23 MR. CHICO: Well, the substance of the appeal is  
24 the order denying the relief from stay nunc pro tunc in the  
25 sense that because the Court determines that the automatic

1 stay applies, it applies from the petition date.

2 THE COURT: But the statute, the state statutes  
3 may have already run.

4 MR. CHICO: Well, we don't believe so because  
5 prior to bankruptcy, there were letters sent to the  
6 underwriters.

7 THE COURT: Right, but, of course, that's not part  
8 of the record. I have another question. I don't think you  
9 served Aon or any of the Aon entities with your motion. I  
10 reviewed the certificate of service and the attachments to  
11 it and I don't see Aon on it at all. Are you looking to  
12 have this relief apply to your claim against Aon where I  
13 lifted the stay consensually some time ago, more than 30  
14 days ago?

15 MR. CHICO: I don't believe so. I think that the  
16 remedy requested was for the underwriters particularly.

17 THE COURT: Where is that stated?

18 MR. CHICO: The order will be -- the request was  
19 against the underwriters, Your Honor.

20 THE COURT: Well, I guess that's another question.  
21 You did serve them with this motion. But you actually,  
22 since they're corporations, don't appear to have served them  
23 properly under Rule 7004. There's no attention general  
24 counsel or some other officer or agent for service; it just  
25 lists their address.

1 MR. CHICO: We also served them by email to their  
2 counsel.

3 THE COURT: Counsel of record in this case?

4 MR. CHICO: I believe so.

5 THE COURT: I didn't see an email aspect in the  
6 certificate of service.

7 MR. CHICO: Well, I can verify, Your Honor, and  
8 supplement this. It's Courtney Murphy, the name of the  
9 person is Courtney Murphy, and I can supplement that by  
10 (sound glitch).

11 THE COURT: I'm sorry. Courtney Mercy?

12 MR. CHICO: Murphy, Murphy.

13 THE COURT: Murphy. And has Courtney Murphy made  
14 a notice of appearance in this Chapter 11 case?

15 MR. CHICO: Need to verify.

16 THE COURT: You're not sure.

17 MR. CHICO: I'm not a hundred percent sure. But,  
18 I mean, the certificate of service and the servicing was  
19 made by my administrative staff, but I can verify that.

20 THE COURT: Okay. Because ultimately, the relief  
21 you're seeking here would be against them, right? It would  
22 be against the party that would potentially be asserting a  
23 statute of limitations defense, not the Debtor.

24 MR. CHICO: Right. This is not -- this order is  
25 not geared towards or against the Debtors. The purpose of

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1 this is that if we are prevented from filing any complaint  
2 to the underwriters, then we should be equally be -- we  
3 should preserve the statutes of limitation that may be  
4 tolling against them, against third parties, not against the  
5 Debtor.

6 THE COURT: Okay. Well, I am concerned that they  
7 really haven't had proper notice of this motion.

8 MS. MARCUS: Your Honor, this is Jacqueline Marcus  
9 on behalf of the Debtors. Maybe I can help a little bit on  
10 this point.

11 THE COURT: Okay.

12 MS. MARCUS: Whether or not the underwriters were  
13 properly served by Santa Rosa Mall, we did provide the  
14 motion to the underwriters' counsel and actually suggested  
15 that they might want to get involved in this dispute. And  
16 their response, somewhat troubling to the Debtors, was this  
17 is really an issue for the Debtors because if there's a  
18 lawsuit against the underwriters, the underwriters are going  
19 to take the position that the Debtors have an  
20 indemnification obligation under the settlement agreement;  
21 and, therefore, the Debtors really are the true party-in-  
22 interest with respect to this dispute.

23 THE COURT: Well, at this point -- because, again,  
24 my order is what it is -- they can't bring a suit against  
25 the underwriters.

1 MS. MARCUS: And that's why our position is that  
2 this whole motion and request is premature because there  
3 isn't a pending lawsuit. We don't know when it will be  
4 commenced; we don't know where it will be commenced. We  
5 don't know what the basis of the lawsuit will be; and,  
6 therefore, we don't even know what statute of limitations  
7 we're talking about.

8 THE COURT: Right. And, of course, statute of  
9 limitations is not jurisdictional, at least in most  
10 distances; and, therefore, it can be waived if it's not  
11 asserted.

12 MS. MARCUS: Correct.

13 THE COURT: So can we turn to that issue? I have  
14 to say that -- well, let me go back. We had a lengthy  
15 hearing on April 23 on Santa Rosa Mall's motion for a  
16 determination that the automatic stay doesn't apply to a  
17 potential suit against the underwriters or, in the  
18 alternative, relief from the automatic stay; that was  
19 extensively briefed. And I, after the hearing, issued a  
20 pretty lengthy bench ruling denying the motion.

21 At the very end of the hearing, this issue that's  
22 now before me was raised I believe in passing, and I said I  
23 haven't thought about it, you're going to have to address it  
24 separately. That was not an invitation necessarily to have  
25 me rule on it. It's just I hadn't thought about it.

1                   Having now seen the motion and reviewed the  
2 issues, this issue does not, in fact, appear to be properly  
3 before me at this point. I think, quite similarly to Judge  
4 Fitzgerald's opinion in *In re. Busy Beaver Building Centers*,  
5 Inc., 127 B.R. 343 (Bankr. W.D. Pa. 1991), for ripeness  
6 jurisdictional purposes, this isn't properly brought before  
7 me. This would come up in a litigation if the underwriters  
8 -- I'm sorry -- if the Santa Rosa Mall was able to sue the  
9 underwriters, at which point, they would assert a defense  
10 maybe on the statute of limitations.

11                  I don't know where that suit would be, whether  
12 it'd be one suit or many suits. The underwriters are not,  
13 some of them, located in the United States. I don't know  
14 what law would govern, what applicable non-bankruptcy law  
15 would govern, which is one of the factors as laid out in  
16 Section 108(c).

17                  In addition, it would seem to me highly unlikely  
18 that in that litigation, if they -- or litigations, if the  
19 defendant or defendants raised the statute of limitations  
20 defense, Santa Rosa Mall would not limit its response to  
21 that defense to Section 108(c), but would also assert the  
22 applicable non-bankruptcy law that would govern in that --  
23 you know, for that lawsuit defense of equitable tolling and  
24 I don't have the equities. I don't have any of that  
25 information before me at this point because there's going to

1 be a lot of time that expires between now and if and when  
2 Santa Rosa Mall is able to bring the lawsuit or lawsuits, so  
3 I couldn't possibly determine equitable tolling today.

4 And it further appears to me, although this does  
5 not appear necessarily to be the law in the Second Circuit,  
6 that the nature of the equities has a bearing on whether a  
7 Court would apply the Valley Transit analysis, so this  
8 really does not appear to me to be ripe.

9 I will note that in the case law, there are times  
10 when the 108(c) issue and the equitable tolling issue are  
11 raised in the context of a bankruptcy litigation. That was  
12 the case in *In re. Morton*, 866 F.2d 561 (2nd Cir. 1989). It  
13 was also the case in *In re. U.S. Lines Inc.*, 262 B.R. 223  
14 (S.D.N.Y. 2001) affirmed 318 F.3d 432 by the Second Circuit.  
15 But that's not necessarily the case.

16 For example, in *In re. Parmalat Securities*  
17 litigation, 493 F.Supp. 2d 723, District Judge Kaplan -- I'm  
18 sorry, it's the Southern District of New York 2007 --  
19 District Judge Kaplan considered a response to a defense  
20 asserted by the defendants there that the statute of  
21 limitations barred the lawsuit and the response to that  
22 defense was twofold: first, 108(c), Judge Kaplan, quite  
23 clearly in Footnote 51 said that once the 30 days expires  
24 after the stay is lifted, 108(c) wouldn't apply, citing  
25 *Aslanidis v. U.S. Lines Inc.*, a different U.S. Lines case, 7

1 F.3d 1067 1073 (2d Cir. 1993).

2 But then he also considered the New York state  
3 law, because New York state law governed, doctrine of  
4 equitable tolling, and he noted that I had issued an  
5 injunction in the Section 304 ancillary proceeding that had  
6 precluded the lawsuit, and that Italian courts in the  
7 Parmalat Italian bankruptcy had issued similar injunctive  
8 relief, and he applied the doctrine of equitable tolling.  
9 But that was the judge presiding over the trial after the  
10 defense was asserted with all the facts before him. I don't  
11 have that.

12 So to me, this seems to be a unripe for  
13 justiciability purposes, you know, Article 3 purposes,  
14 dispute, and I don't believe I should deal with it.

15 MR. CHICO: May I?

16 THE COURT: You've gone -- let me just say one  
17 more thing. You've gone on record in seeking this relief  
18 now, so you have shown, unlike the plaintiff in the U.S.  
19 Lines case that lost before the Second Circuit and Judge  
20 Sweet in 2001 that, at least with respect to making this  
21 motion in response to my order, you've been diligent.

22 I don't know has happened though before then and,  
23 you know, particularly since it was somewhat ambiguous to me  
24 as far as Aon is concerned, but you've answered; this  
25 wouldn't apply to Aon, I suppose, this relief you're

1 requesting. But it just doesn't -- it's not -- this is not  
2 a judicial issue at this point. So you can go ahead.  
3 That's my preliminary ruling.

4 MR. CHICO: Okay. I appreciate the Court's  
5 ruling. I just wanted to clarify. In some of the cases  
6 that we found and cited, Your Honor, the controversy was --  
7 is rooted on an extension of the automatic stay and whether  
8 or not that tolling in those separate cases in non-  
9 bankruptcy court.

10 In this case -- by the way just to clarify, Puerto  
11 Rico, we sustain Puerto Rico law would apply because it's an  
12 insurance issue and insurance issues in Puerto Rico have to  
13 be heard in Puerto Rico and that's why we cited -- we made a  
14 chart with the applicable Puerto Rico statutes. But in some  
15 of the cases that we cited, that non-bankruptcy litigation  
16 happened or is rooted out of an extension of the automatic  
17 stay, whether the automatic stay extended or when the  
18 automatic stay was declared or not to extend to third  
19 parties.

20 In this particular case, Your Honor, the Court's  
21 ruling was that the Court made a distinction and said I am  
22 not extending the automatic stay; I am merely declaring that  
23 the automatic stay applied. And when we look at Section  
24 108(c), the statute refers to the debtor, only to the  
25 debtor. And what we seek was if the Court ruled that the

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1 automatic stay applies in this case, then it's not extending  
2 it to third parties, then we just wanted a clarification  
3 that the statute that provides for the tolling when the  
4 automatic stay applies equally applies against those third  
5 parties because it was not extended; it merely stated it  
6 applies.

7 THE COURT: Well, again, it's not a ripe  
8 controversy.

9 MR. CHICO: Okay. Thank you, Your Honor.

10 THE COURT: I mean, it's just not ripe. And in  
11 any event, the fact that I stayed you one way or another  
12 from proceeding against the underwriters is really your  
13 issue, but that's an equitable doctrine, and the  
14 underwriters should be able to litigate that issue if and  
15 when they assert the defense. 105 can't be used to inject  
16 it into 108; the law is clear on that. 105 does not allow  
17 the Bankruptcy Court to override an explicit mandate of  
18 another section of the Bankruptcy Code. *Law v. Siegel*, 571  
19 U.S. 415 421 (2014).

20 So you're going to be relying on the equities  
21 anyway one way or the other. And you're assuming that  
22 you're going to win on the appeal and, therefore, get stuck  
23 because you've not been able to sue the underwriters in the  
24 meantime. But, of course, again, that was the case always,  
25 so the nunc pro tunc relief doesn't make sense.

1                   So I just -- this is just not the right context as  
2 a justiciability matter, not a matter at my discretion, to  
3 hear this issue. And, you know, Judge Fitzgerald's not  
4 alone on that issue; this has been dealt with a lot in other  
5 contexts. See, for example, *Wisniewski v. (indiscernible)*  
6 Manufacturing Corp., 2018 US Dist Lexis 721 at page 5 (W.D.  
7 Wisc., January 3, 2018) and the case that, besides the *Busy*  
8 *Beaver* case that I already noted, the Debtors cite in their  
9 objection *Davis v. Vanguard Home Care, LLC.*, 2016 US Dist  
10 Lexis 167098 at pages 6-9.

11                  This just isn't, you know, the right -- it's not  
12 ripe to hear it at this point. It should be heard by the  
13 Court, if you ever get the chance to sue the underwriters,  
14 that is hearing that lawsuit if and when the underwriters  
15 raise the defense of the statute of limitations. And I'm  
16 sure you're going to combine, because it would be the smart  
17 thing to do given the case law, equitable tolling and 108.  
18 And I say that because most of the case law in 108,  
19 including in the Second Circuit, provides for tolling only  
20 for 30 days after the stay is lifted and it does say only as  
21 to the debtor.

22                  So your best shot here, as Judge Kaplan very  
23 astutely noted in the *Parmalat* case that I already cited, is  
24 to rely on equitable tolling, which is not even before me at  
25 this point. So I'm going to deny the motion. I'm going to

1 ask you to prepare the order. The Debtors have spent too  
2 much money already on Santa Rosa Mall issues, so you can  
3 prepare the order, send a draft to Miss Marcus. And then  
4 after a day or so, you can email the order to chambers for  
5 entry denying the motion for the reasons stated by the Court  
6 on the record at the hearing.

7 MS. MARCUS: Thank you, Your Honor. I think that  
8 brings us to the conclusion of today's calendar. The other  
9 matters on the agenda have all been adjourned.

10 THE COURT: That's right. So I'm going to ring  
11 off now; that would end today's hearings. Thank you.

12 MS. MARCUS: Thank you, Your Honor.

13 (Whereupon these proceedings were concluded)

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2 C E R T I F I C A T I O N

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4 I, Sonya Ledanski Hyde, certified that the foregoing  
5 transcript is a true and accurate record of the proceedings.

6

7 *Sonya M. Ledanski Hyde*

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9 Sonya Ledanski Hyde

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1 Date: June 19, 2020

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[&amp; - 7841]

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**[7846 - approach]**

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